



Section 36 Case Analysis Report

| Complainant | Respondent | Office | File Number |
|-------------|--|----------------------|-------------|
| David Noble | York University and Robert Drummond, Lorna Marsden, Patricia Bradshaw | Investigation Office | AAHD-6HBS9C |

Main Points From Parties' Positions

1. The complainant, David Noble, alleges unequal treatment in services and with respect to employment on the basis of creed and association, in contravention of sections 1, 9 and 12 and subsection 5(1) of the **Human Rights Code**, R.S.O. 1990, c. H.19, as amended (the "**Code**") and reprisal for claiming and enforcing his rights, in contravention of section 8 of the **Code**. Prof. Noble self-identifies as Jewish. He alleges that the respondents afford privileged accommodation to Jewish students at the respondent university ("York") with regard to observance of religious holidays. The respondents deny the allegations.

Background

2. Prof. Noble has been a tenured full professor of Social Science at York since 1991. Personal respondent Lorna Marsden was the President, Vice-Chancellor and chief executive officer of York from 1997 to 2007. At the material times, personal respondent Patricia Bradshaw was Chair of the York Senate and personal respondent Robert Drummond was Dean of the Faculty of Arts.

Evidence

Does the evidence indicate that the complainant was subjected to unequal treatment in services and employment because of creed and association, and to reprisal for claiming and enforcing his rights?

3. Prof. Noble asserts that York is the only public university in Canada that does not permit classes to be scheduled on the Jewish high holy days. He asserts further that observers of other religions do not benefit from the same type of religious accommodation. In a letter to Dr. Marsden in September 2004 Prof. Noble raised concerns about the practice of not scheduling classes on the Jewish high holy days, asserting that it was an imposition of religious observance and contravened section 15 of the *York University Act* (hereinafter the "*York U. Act*"). Dr. Marsden referred his issues to the York Senate on the basis of her assertion that class scheduling falls within its authority. He made the same request of Dr. Bradshaw, then Senate Chair, and a report issued in September 2005 indicated that the practice would be maintained; the report did not address the issue of differential treatment inherent in the practice. Prof. Noble then informed his classes and issued a notice in the student paper that he would defy the practice by holding classes on the Jewish high holy days; threatened with disciplinary action, he complied with the practice and cancelled his classes on the dates in question, but also cancelled classes on religious holy days of students of other religions, to ensure equal treatment.

4. The evidence indicates that York has a long-standing practice of not scheduling classes on the Jewish High Holy days of Rosh Hashanah and Yom Kippur.

5. Prof. Noble argues that the practice of not allowing him to hold classes on specified Jewish holy days is tantamount to imposing religious observance on him, in contravention of section 15 of the *York U. Act*. Furthermore, the practice unfairly privileges some members of the community on the basis of creed.

6. Distinct from the practice of not scheduling classes on Jewish high holy days, York's *Senate Policy on Sessional Dates and the Scheduling of Examinations* provides that "no in-class or formal examinations will be scheduled on the evening prior to, or the day of, the religious holy days of the first and second days of Rosh Hashanah or Yom Kippur or the first two and last two days of Passover." Dr. Marsden says the Policy was established because many professors took the Jewish high holy days off work as religious accommodation, and there were not enough classes to justify running the schedule.

7. York's Senate Policy includes a statement under the section entitled "Religious Observance" that York respects the religious beliefs and practices of all members of the community and is committed to accommodating the religious observances "of special significance to adherents." It states further that "Every effort will be made to avoid scheduling in-class or formal examinations on days of special religious significance throughout the year. A schedule of dates for such days for various faiths will be compiled annually and distributed widely..." The website declares that University event planners and faculty members are "encouraged" to take the listed dates into consideration when scheduling events. The respondents indicate that where religious accommodation is required, a student secures an alternative date from the instructor for an exam, test or assignment, and completes a form posted on the website of the Registrar's Office, to ensure that the later grade will be respected.

8. Prof. Noble reiterated his concerns in a letter dated August 29, 2005 addressed to Dr. Bradshaw and the Senate Executive Committee; it was determined that there was no breach of the *York U. Act*. A third letter, dated October 2, 2005, reiterating the earlier concerns was forwarded to York General Counsel for response. In a letter to the Minister of Training, Colleges and Universities, Counsel stated that York's long-standing practice of not scheduling classes or exams on Rosh Hashanah, Yom Kippur and specified days of Passover was established by the Faculty of Arts in 1972 and extended to all faculties in 1974 by vote of the Senate. In 1996, the practice of not scheduling exams on the days in question was incorporated into a Policy, and approved by the Senate. The Vice President Academic committed to Senate that York would continue the practice of not scheduling classes on the Jewish holy days. Counsel concluded her letter by stating that the practice did not violate the religious accommodation provisions of the *York U. Act* which, she wrote, were aimed at preventing forcible religious observance.

9. Dr. Marsden asserts that no formal complaints have been filed by students or other faculty regarding the practice in question. She points out that the university is open for study, work and research on days when classes are not permitted to be scheduled as per the practice.

10. Dr. Bradshaw states that in the view of the Senate Executive Committee there was no basis for Prof. Noble's assertion that the class scheduling practice amounted to an imposition on all members of the university community of particular religious observances, and therefore did not constitute a breach of the *York U. Act*. Nor had Prof. Noble raised any academic problems that needed to be addressed by the Senate because in their view students were not being penalized by lost sessions.

11. The evidence indicates that class scheduling is determined by the Office of the Registrar, not by the Senate. The Senate Curriculum and Academic Standards Committee has reviewed the non-scheduling of classes on the Jewish high holy days and supported maintaining the practice until such time as an increase in the size of the student body might compel reconsideration thereof. However, neither the Committee or the Senate has addressed the issue of alleged differential treatment raised in the present complaint.

12. Prof. Noble states that as a non-observant Jew he is forced to forego three days and evenings of classes. He asserts that in order to afford equal treatment to all of his students, and since he is not permitted to hold classes on Jewish high holy days, he has cancelled classes on the religious holy days of students of other creeds. He believes that York's practice of not holding classes on Jewish holy days results in resentment on the part of students of other creeds whose own holy days are treated differently and who have to seek individualized accommodation for their observance, and leads to an increase of anti-Semitism. Prof. Noble says students of other faiths who have complained to him about the impact of York's religious accommodation practice on them have not filed their own complaints because they fear being labeled as

anti-Semitic, and suffering consequent damage to their reputations and careers. He says he thought he could challenge the discriminatory practice with immunity from being attacked as an anti-Semite, which charge he did not escape.

13. Four Muslim students and one Orthodox Catholic student, all formerly of York, were interviewed in the course of the investigation. Witnesses believe that York should treat all religious groups the same. They note that in order to observe their religious holy days they had to approach professors one by one to make arrangements for missed classes, tests, assignments and so on, with different instructors approaching religious accommodation differently, reflecting a variety of ideologies and resulting in arbitrary results. For example, some instructors will allow an exam or test to be written on an alternate date, while others exempt the students from writing that particular test completely, but weight the final exam differently, resulting in an academic disadvantage. Witnesses say that many students do not request accommodation for religious observance because it is a hassle and because many feel vulnerable due to being in Canada on student visas, post-911 issues and so on.

14. The respondents indicate that application of the practice is not formally monitored. Limited data are available regarding the number of students who request religious accommodation and how their requests are managed. In 2006-2007 there were 91 deferrals of exams, tests or assignment deadlines for religious accommodation, with no breakdown of the creeds of the students concerned. In 2005-2006 there were 126 such deferrals; and in 2002-03, 185 deferrals.

15. A witness from the Canadian Association for the Prevention of Discrimination and Harassment in Higher Education states that most universities and colleges try to accommodate students for religious observance on an individual basis. The evidence indicates that the University of Toronto and University of Western Ontario have policies/procedures that suggest that exams not be scheduled and first days of classes not take place on specified Jewish high holy days.

REPRISAL

16. Prof. Noble asserts that immediately upon going public with his objections to York's practice, he began to experience harassment and intimidation which took forms including: menacing anonymous untraceable phone calls at work and at home; expressions of outrage at his purported betrayal of his "fellow Jews", offers of prayers of atonement for him; being condemned as an "imposter Jew", a "self-hating Jew" and an anti-Semite. He says that after he announced that he would hold classes on the Jewish high holy days in the fall of 2005 he was warned by the York University Faculty Association that he would face "serious consequences" if he held classes on those days. He says he faced open disdain and hostility from some Jewish students in his classes, and threats and aggressive behavior on the part of one Jewish student, which prompted him to complain twice to York Security (October 2005 and January 2006). He says his security complaints have not been adequately addressed.

17. In late 2005 the particularly hostile Jewish student filed a complaint of

discrimination against Prof. Noble. Prof. Noble asserts that Dean Drummond prematurely determined that an investigation of the student's complaint was warranted, in violation of the process set out in the Collective Agreement. Prof. Noble maintains his security complaint received a cursory review by the Office of Student Conduct, and was then forwarded to York's Centre for Human Rights where no further action was taken. The respondents say Prof. Noble did not engage in the process. Prof. Noble believes the York administration is under pressure from wider Jewish community organizations to maintain the status quo in terms of the policy/practice, to dismiss his complaint against the student, and to promote the student's complaint against himself. He believes all of this is in reaction to and reprisal for his challenge to York's practice regarding religious observance.

18. The respondents contend that Prof. Noble's security complaint was dealt with in accordance with procedures prescribed by the applicable Collective Agreement. Ms. Marsden points out that he was interviewed by Security Services and indicated to the interviewer that the student had not threatened him with physical harm. She says Prof. Noble did not report further incidents. The respondents say there is no activity report concerning Prof. Noble's security complaint against the student. They say he just called in but did not pursue it as a formal complaint, and did not formally notify York that he felt endangered. Prof. Noble points out that he filed a second security complaint against the same student on January 12, 2006, without result. He states that he and his family were very frightened by the student's behavior and should not have to wait for possible physical harm before having his concerns taken seriously.

19. The respondents say York Security does not have jurisdiction to investigate complaints such as that of Prof. Noble's against the student, and nor do they get involved in dispute resolution; their role is strictly with respect to immediate safety on campus. They state that complaints about students are made to the Office of Student Conduct, and if there is a human rights dimension to a complaint the Ombudsperson and Centre for Human Rights get involved. They say the process was just being worked out at the time of Prof. Noble's complaint, the Office of the Ombudsperson and Centre for Human Rights having been created in January 2005.

20. Prof. Noble wrote to York's Ombudsperson in November 2005 expressing concern about the practice of prohibiting the scheduling of classes on the Jewish high holy days, impinging as it does on non-observers like himself and discriminating against York community members of faiths other than Jewish, whose observances are not accorded equivalent accommodation. He asked the Ombudsperson to declare the practice discriminatory and recommend either its immediate termination or equitable extension. The evidence indicates that the Ombudsperson reviewed the practice and determined there was no adverse impact on Prof. Noble and no violation of the **Code**. In a letter to Prof. Noble the Ombudsperson suggested that York would inevitably have to confront the challenge of "equivalent accommodation" in the observance of religious holy days, "in light of dramatically changing demographics within the student body."

21. While Dr. Marsden said she knew of no other complaints about the practice, the

evidence indicates that the York Federation of Students ("YFS") challenged York's practice in 2005 by formally requesting that Muslim students be afforded the same type of accommodation for religious observance as Jewish students. The Media Relations Director indicated to York administrators that she was worried that YFS had taken up the issue, thus lending it greater legitimacy. The Media Director further stated that "in the realm of public opinion, however, we could have a longer term problem, since the issue of religious accommodation is a challenge facing society at large as demographic trends evolve – and York University is an interesting microcosm for outsiders to study/criticize."

SECTION 34

22. The respondents requested application of subsections 34(1)(a) and (b) of the **Code**. They argue that since the complainant is a member of the York University Faculty Association he is obliged to rely on the grievance and arbitration process in addressing the issues raised in his complaint, pursuant to Article 9.02 of the Collective Agreement which stipulates that the procedures detailed therein are the only method for resolving complaints or grievances arising from the interpretation and application of the Agreement. Article 3 contains a non-discrimination clause. The respondents also assert that the complainant's motivation in filing the complaint is "highly political" and that the allegations contained in his complaint do not reveal a *prima facie* infringement of the **Code**.

23. The evidence indicates that the complainant initiated grievance proceedings in November 2004 with respect to matters related to the present complaint. Prof. Noble says that since the faculty association refused to pursue his allegations of unequal treatment and his reprisal complaint cannot stand alone, he has been unable to have his allegations addressed through the process established by the Collective Agreement. Prof. Noble asserts that the Human Rights Commission alone is positioned to examine all of the allegations contained in his complaint. Furthermore, Prof. Noble points out that he filed the present complaint pursuant to section 12 of the **Code** alleging association with students who have complained to him about the unequal treatment, none of whom are members of the collective bargaining unit or party to the relevant Collective Agreement.

24. The evidence indicates that the complainant attempted to address his issues through the Collective Agreement, without success. There is insufficient evidence to support the respondents' assertion that the subject-matter of the complaint is frivolous and vexatious and the complaint is made in bad faith. Consequently, it is recommended that the Commission exercise its discretion and deal with this matter.

Summary Analysis & Recommendation

25. The university's practice of not scheduling classes on Jewish high holy days clearly results in differential treatment on the basis of creed, in that individuals in one group (those of Jewish faith) are given preferential treatment over others. The

Commission's *Policy on Creed and the Accommodation of Religious Observances* cites the decision of the Supreme Court of Canada in the *Chambly* case, in which it ruled that since Christian employees receive the benefit of two paid religious leave days through the statutory holidays for Christmas and Easter, non-Christian staff were subjected to constructive discrimination. York's practice has a similar effect, in that Jewish students are entitled to observe their religious holy days without missing classes or having to specifically request religious accommodation, while students of other faiths are required to either miss classes or take proactive steps to negotiate accommodation for their religious observances.

26. The Commission's *Policy* cites as an example of direct discrimination in services on the basis of creed, a public school giving priority to the Lord's Prayer as part of opening and closing exercises, stating that such a practice fails to treat non-Christians equally. York's practice is an analogous situation. The evidence relating to the reprisal allegations is less clear and requires testimony under oath to assess the relative weights of the positions of all parties on that ground.

27. In summary, given the issues raised by this complaint and pursuant to section 36 of the **Code**, it is left to the Commission to determine, based on the evidence, whether the subject matter of the complaint should or should not be referred to the Human Rights Tribunal of Ontario.

March 25, 2008